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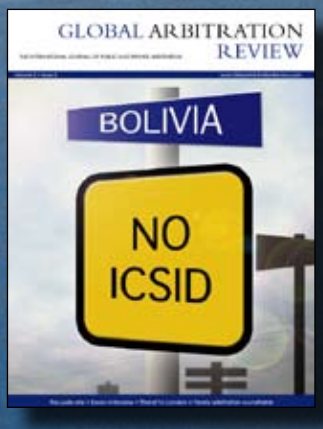

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Recent decisions on section 1782 could put US companies at a disadvantage in international arbitration. Michael Nolan, partner, and Lesley Benn, associate, of Milbank Tweed Hadley & McCloy LLP in Washington, DC explain

Whether unfettered access to United States discovery – through a US statute – is available to parties in international arbitration is a hot topic following a recent federal court decision. The implications of the case have potential to be profound for the exchange of evidence in international arbitration and for the strategy and tactics of potential parties to such proceedings.

On 19 December 2006, in *In re Application of Roz Trading Ltd*, Case No. 1:06-cv-02305-WSD (19 Dec 2006), the court held that section 1782 of the United States Code could be used by a party to a private commercial arbitration pending in the Austrian Federal Economic Chamber in Vienna. In those arbitral proceedings, Roz Trading is claiming that the respondent, Coca-Cola Export Company, has breached a contract entered into among Roz, Coca-Cola Export and the government of Uzbekistan.

Roz applied to the district court for the Northern District of Georgia, seeking documents from The Coca-Cola Company, a non-party to the arbitration and the parent company of the respondent. Coca-Cola opposed the section 1782 application on the ground that the International Arbitral Centre of the Austrian Federal Economic Chamber – which was administering the arbitration – was not a "tribunal" for purposes of section 1782.

The court disagreed and found that the international arbitral panel was a tribunal within the meaning of that section. It relied largely on the Supreme Court's decision in *Intel Corp v Advanced Micro Devices* (discussed in detail below).

The court wrote:

> *Although the Supreme Court in Intel did not address the precise issue of whether private arbitral panels are 'tribunals' within the meaning of the statute, it provided sufficient guidance for this Court to determine that arbitral panels convened by the [arbitral] Centre are 'tribunals' within the statute's scope. (Id at *6).*

It also considered the meaning of the term "tribunal" as used in the statute. It rejected a finding from a Second Circuit decision – the *NBC* case (discussed below) – that the term was ambiguous, and found that it clearly included arbitral tribunals. Notably, the *Roz* court did not address various policy considerations that were articulated in earlier cases, particularly *NBC*, concerning the efficiency and cost-effectiveness of arbitration being at odds with the broad-ranging discovery of US litigation.

Section 1782 (28 USC § 1782) permits a party to "a proceeding in a foreign or international tribunal" to apply directly to a United States court to take evidence located in the United States for use in such a proceeding. The statute may be used to obtain both documents and deposition testimony. Although the statute was enacted in its current form in 1964, it had rarely been invoked in connection with international arbitration proceedings before the late 1990s. The statute declares in relevant part:

> *The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application or any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.*

US-style discovery was considered to be at odds with international arbitration, which was viewed to be better off without having access to section 1782

Section 1782 had been completely revised in 1964. The previous law's words "in any judicial proceeding pending in any court in a foreign country" were deleted. They were replaced with the phrase "in a proceeding in a foreign or international tribunal".

Early restrictive readings

Some courts in the United States had initially followed the view that the use of the term "international tribunal" in section 1782 meant that it should apply not only to foreign court proceedings, but also to international arbitrations conducted outside of the United States. Two important decisions in the late 1990s, however, rejected that view, refusing to extend the application of section 1782 to international tribunals.

The Second Circuit in *NBC v Bear Stearns & Co*, 165 F3d 184 (2d Cir 1999), concluded that section 1782 did not apply to private arbitral tribunals. The *NBC* court said that section 1782 applied only to foreign governmental bodies, such as courts and investigative authorities (Id at 188). This meant that a private international arbitration tribunal was not a "foreign or international tribunal" for its purposes. Section 1782 was on this basis held to be unavailable to parties to private commercial arbitration proceedings. The Fifth Circuit Court adopted the same analysis shortly thereafter in *Republic of Kazakhstan v Biedermann Int'l*, 168 F3d 880, 882 (5th Cir 1999).

In *NBC*, the Second Circuit expressed the concern that a different interpretation of section 1782 could operate to the detriment of the "asserted efficiency and cost-effectiveness" of arbitration. The Second Circuit refers to efficiency and cost-effectiveness as being at odds with "the broad-ranging discovery made possible by the Federal Rules of Civil Procedure". "Opening the door to the type of discovery sought by NBC in this case likely would undermine one of the significant advantages of arbitration, and thus arguably conflict with the strong federal policy favoring arbitration as an alternative means of dispute resolution" (*NBC v Bear Stearns,* supra, at 191). Other courts followed this reasoning, saying they were unwilling to interfere with what they characterised as the speediness and effectiveness of the arbitral process conducted in foreign countries. Thus, United States-style discovery was

considered to be at odds with the very idea of international arbitration. The world of international commercial arbitration was viewed to be better off without having access to section 1782.

The Supreme Court opens the door

Five years after the Second Circuit's decision in *NBC*, the United States Supreme Court considered section 1782. Several major questions respecting the section were presented to the Supreme Court in *Intel Corp v Advanced Micro Devices Inc* (542 US 241 (2004)). In each of them, the court chose a broad reading of the section over a narrow one. First, the court addressed the question of whether section 1782 contained a "discoverability requirement". The federal circuits in the United States had been split regarding whether section 1782 required, implicitly, that the evidence being sought would be obtainable under the law of the relevant foreign jurisdiction – were the evidence located there.

Second, the Supreme Court held that section 1782 does not require that a foreign proceeding be "pending" or "imminent". Noting that Congress deleted the statute's previous reference to "pending" in the 1964 amendment, the Supreme Court said there was no such limitation on the application of section 1782. Rather, it held that a "dispositive ruling [...] be within reasonable contemplation" (Id at 258-59) – but did not define the phrase "reasonable contemplation". In rejecting both the "discoverability" and "pending" requirements, the United States Supreme Court also addressed other issues concerning the interpretation of section 1782.

The Supreme Court in *Intel* ruled that the European Commission's directorate general for competition qualified as a section 1782 tribunal. This conclusion rested on, among other things, a functional analysis of the directorate general as the initial decision maker in a proceeding "that leads to a dispositive ruling, that is, a final administrative action both responsive to the complaint and reviewable in court" (Id at 255). Although the precise question of whether a private arbitration tribunal is a "tribunal" under section 1782 was not before the Supreme Court, the court referred to the legislative history of that statute, finding that Congress's intent was for United States courts to provide judicial assistance to "administrative and quasi-judicial proceedings abroad" (542 US at 258). The Supreme Court in *Intel*, therefore, substantially broadened the availability of discovery orders from United States courts for use in foreign proceedings – arguably including private commercial arbitration – under section 1782.

In the wake of *Intel*, scholars and commentators debated the actual impact of the decision for private commercial arbitration, given that the Supreme Court was at no point asked to address that issue.

Now two recent district court decisions have adopted the liberal approach to section 1782. One – *Roz Trading* – was mentioned above; the other – *In re Oxus Gold PLC* 2006 WL 2927615 (DNJ Oct 11, 2006) – preceded it by a couple of months. In *Oxus*, a federal district court in New Jersey authorised the use of section 1782 to permit a UK company to issue a subpoena for documents and deposition testimony in aid of an investor–state arbitration in London. The arbitral proceeding was being conducted pursuant to a bilateral investment treaty between the United Kingdom and Kyrgyzstan. The district court magistrate distinguished the pre-*Intel* decisions on the basis that the arbitration was not the result of a private agreement but, rather, was "authorized by the sovereign states of the United Kingdom and the Kyrgyzstan Republic [sic] for the purpose of adjudicating disputes under the [BIT]" (Id at

Widespread access to section 1782 for parties engaged in private international arbitration could lead to significant imbalance between foreign parties and US counterparts

*6). The district judge has now affirmed the order of the magistrate judge (on 2 April 2007). Two months later, the federal court in *Roz Trading* went the next step, holding that section 1782 could be used to obtain evidence for a private international commercial arbitration.

Where next?

The scope of the evidence-gathering process is an issue that is already being discussed in the context of international arbitration. A concern frequently is expressed that 'US-style' discovery is the order of the day – contrary to what are said to be primary objectives of arbitration, namely, economy and expedition. Although this concern made its way into the *NBC* decision in 1999, the most recent decisions interpreting section 1782 have not addressed it. It may be too early to predict the impact of the District Court's decision in *Roz* – the decision is now on appeal to the Eleventh Circuit Court of Appeals – but it seems likely to invite further applications under section 1782 in aid of international arbitration. Foreign parties are likely to have an easier time seeking discovery under section 1782 than through other available options. No letters rogatory, treaty provisions, or United States government assistance is required for a foreign party to invoke section 1782 assistance. If the *Roz* decision marks the start of a line of cases interpreting section 1782 similarly, then US-style discovery – in its literal sense – may become the order of the day.

In addition, widespread access to section 1782 for parties engaged in private international arbitration could result in significant imbalance between foreign parties and their US counterparts. Section 1782 could be used by foreign parties to access US-style discovery, while the US party would enjoy no such access to their adversaries' documents abroad. Although this sort of imbalance could be addressed by the arbitration tribunal directly, there will not necessarily even be a tribunal in place to do so. For example, resort can be had to section 1782 where arbitration is only within "reasonable contemplation" – to use the words of the Supreme Court in *Intel*. This means that a foreign party may apply for access to broad discovery of a US company when commercial arbitration is merely a prospect.

Moreover, international arbitral tribunals pride themselves on having flexibility in regulating the evidence exchange process. They typically can order parties to produce such evidence as the tribunal may deem appropriate, wherever it may be located. Few, if any, non-American tribunals of any kind, including arbitration tribunals created by private parties, provide for the kind of discovery that is commonplace in United States courts. Courts faced with applications under section 1782, therefore, may interfere with the way in which the arbitral tribunal wants to proceed. Under usual international rules, tribunals have considerable leeway in determining whether and to what extent to order parties to produce information. But section 1782, as written, does not require a US federal court to defer to the judgment of the international tribunal on whether the information sought should be ordered.

The recent, liberal readings of section 1782 in the wake of the US Supreme Court's decision in *Intel* may expand US-style discovery to countless foreign proceedings. It is a paradox that the very system so criticised by foreigners as burdensome and exorbitant in what it permits may be accessible to foreign parties engaged in, or even contemplating the engagement of, international commercial arbitration – but not to their US counterparts. US companies meanwhile are likely to suffer the effects in international commercial arbitration, as they are the ones most likely to have discoverable information in the US.

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